terminating an interstate call (a call made from outside the state to the local carrier's customer) or an intrastate call (a call made from within the state to the local carrier's customer). Typically, SBT charges more for terminating intrastate calls than SBT does for terminating interstate calls. In other words, although SBT performs exactly the same function in both cases, SBT charges Global Crossing substantially less for terminating a call from Missouri to Kansas than it does for terminating a call made from St. Louis to Springfield. As a result, the jurisdictional character of each call – interstate or intrastate – is critical to determining the proper charge to be paid by Global Crossing to SBT.

11. Section 2(b) of the FCA defines the jurisdictional spheres of the FCC and state public utility commissions. Generally, the FCC has exclusive authority over rates, terms, and conditions of interstate telecommunication services, while the state commissions have exclusive authority over rates, terms, and conditions of intrastate telecommunication services. Congress assigned to the FCC under the FCA exclusive authority to determine matters of "jurisdictional separations," *i.e.*, whether a call is properly characterized as intra- or interstate. Once the FCC has resolved such matters, tariff filers, such as SBT, are obligated to abide by such determinations, and state commissions are without authority to alter such determinations. After the FCC's prescribed "jurisdictional separations" method is applied, the resulting interstate calls are subject to FCC tariffs and authority and the intrastate calls are subject to state public utility commission tariffs and authority; the power to make the initial jurisdictional determination, however, is exclusively with the FCC.

12. The FCC has consistently followed the principle that the factors to be used in identifying the jurisdictional character of any call are the actual originating and termination points of the call, regardless of where the call travels in order to get from one point to the other.

If the actual points are known, no further analysis of the originating or terminating aspects of the call is warranted for purposes of determining whether the telephone call is interstate or intrastate.

13. In those cases where the actual originating point – or its geographic location – is unknown, however, the FCC has created a proxy in order to supply the missing information. In such cases, the FCC uses the first clearly identifiable location within the transit of the call: the first point at which the call is encountered by the long distance telephone company. This "network entry" point is deemed to be the originating point of the call for purposes of jurisdictional analysis where the actual location is unknown, and the process by which such points are identified is referred to as the "Entry-Exit Surrogate" ("EES") method.

14. SBT incorporated into its Interstate Tariff a set of mandatory procedures in order to implement this EES methodology. These procedures include, among other things, reliance upon certain percent interstate use ("PIU") reports, which are prepared by long distance carriers on a regular basis to calculate the percentage of interstate telephone calls. SBT is required by the FCA to abide by these mandatory procedures contained in its Interstate Tariff.

15. Consistent with the SBT Interstate Tariff, Global Crossing has calculated and calculates its quarterly PIU pursuant to the SBT Interstate Tariff.

16. The mobility of wireless telephones causes the jurisdictional nature of calls originating from such telephones to be incapable of determination solely from SBT's call records that contain the originating and terminating telephone numbers. Global Crossing, however, has provided information demonstrating that certain of these wireless calls can only be properly characterized as interstate, notwithstanding the appearance of being intrastate on SBT's call records. Even if one characterizes the actual originating point of a wireless call as "unknown,"

application of the EES methodology would require that the wireless calls at issue be classified as jurisdictionally interstate.

17. In providing jurisdictionally interstate services, SBT may not assess a fee for jurisdictionally interstate services under any tariff other than the SBT Interstate Tariff.

18. Yet, this is precisely what SBT has done. SBT has charged Global Crossing for terminating interstate traffic at rates other than those set forth in its Interstate Tariff. It has done so either in circumstances where there can be no doubt that the calls were interstate in nature (if one characterizes the calls where the jurisdiction is "known," based upon the information supplied by Global Crossing) or in a manner inconsistent with the PIU provisions in its Interstate Tariff (if one characterizes the call where the jurisdiction is "unknown").

19. Global Crossing has repeatedly advised SBT of the impropriety of this conduct and has requested SBT to refrain from engaging in this practice. To date, SBT has refused to do so.

20. As a result of SBT's actions, Global Crossing has been and continues to be overcharged by SBT for terminating access services. Global Crossing has been and continues to be billed by SBT at the rate for terminating intrastate calls while, in fact, SBT terminates interstate calls. By the date of this filing Global Crossing approximates that SBT has overcharged and has collected well in excess of $1 million.

COUNT I

(Declaratory Judgment Regarding Federal Tariff)

21. Global Crossing repeats and incorporates herein by reference the allegations of Paragraphs 1-20.

22. Global Crossing is entitled to a judgment against SBT declaring that SBT's assessment of terminating access rates on interstate telephone calls on rates, terms, and

conditions different from those specified in the SBT Interstate Tariff is unlawful under the FCA and a permanent injunction barring SBT from providing interstate access services to Global Crossing except as permitted under the relevant rates, terms, and conditions of the SBT Interstate Tariff.

<u>COUNT II</u>

(Damages for Violations of the FCA)

23. Global Crossing repeats and incorporates herein by reference the allegations of Paragraphs 1-22.

24. Global Crossing has incurred damages in the form of overcharges as a direct result of SBT's conduct of billing Global Crossing for terminating interstate telephone communications at rates that are in violation of the SBT Interstate Tariff. Such amounts will be determined at trial of this action.

WHEREFORE, plaintiff Global Crossing Telecommunications, Inc. respectfully requests the Court to enter a final judgment against defendant Southwestern Bell Telephone, L.P., awarding Global Crossing:

(1) A declaratory judgment to the effect that the FCA prohibits SBT from charging Global Crossing intrastate rates for interstate wireless telephone access services;

(2) A permanent injunction barring SBT from charging Global Crossing any rate other than SBT's interstate rate for wireless telephone communications that are interstate in character;

(3) Damages on account of SBT's violations of the FCA in an amount to be determined at a trial of the action;

(4) Such other and further relief as the Court deems just and proper.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GLOBAL CROSSING TELECOMMUNICATIONS, INC., Plaintiff,	)	
vs.	)	Case No. 4:04CV00319 ERW
SOUTHWESTERN BELL TELEPHONE, L.P., Defendant.	)	

ORDER

This matter is before the Court on Defendant's Motion to Dismiss Case [doc. # 14] and Defendant's Motion to Stay [doc. # 17].

Global Crossing, a Michigan Corporation, as a nationwide interexchange carrier (IXC), provides, among other things, long distance telephone services in several states serviced by Southwestern Bell Telephone, L.P. (Bell) including Arkansas, Missouri, Kansas, Oklahoma, and Texas. Bell, a Texas limited partnership, is known in the trade as an incumbent local exchange carrier (ILEC), and is authorized to provide access to facilities for interstate telephone services to IXC's such as Global Crossing.

While placing a telephone call is a simple matter for those not involved in the telecommunications industry, the placing of the call triggers a complicated series of events dictated by federal and state law. For example, suppose an Arizona resident calls a Missouri resident who is a Bell customer. If Global Crossing was the IXC for that particular call, it would have to perform three general functions: (1) pick up the call from the carrier; (2) carry the call to the state in which the person being called is physically located; and (3) deliver the call to the

ILEC, where the person being called is located.

As the ILEC in this particular call, Bell charges the IXC, here Global Crossing, for this third function, and the charge is referred to as a terminating access charge. The amount Bell charges depends on whether it is terminating an interstate call (one made from outside the state to the local carrier's customer) or intrastate call (a call made from within the state to the local carrier's customer). The issue of whether a call is properly classified as interstate or intrastate is critical because different tariffs apply for each, and Bell usually charges more for terminating intrastate calls.

In the typical call made over a land line, it is easy to determine whether a call is interstate or intrastate. Due to the mobility of cellular telephones, it can be extremely difficult to make this determination when the caller uses such telephones. Thus, suppose a caller, while physically located in Illinois, uses a Missouri cellular phone with the 314 area code to place a long-distance call to another Missouri resident's home telephone. Bell, as the ILEC, would not know from the data it received from the IXC that the hypothetical caller was in Illinois when the call was placed. Thus, under its interpretation of its tariffs, Bell charges for terminating an intrastate call, relying on the fact that the caller called a Missouri telephone number with a Missouri telephone number. Bell can also lose money under its interpretation, as well. A Los Angeles cellular caller may, for example, take his Los Angeles area code cellular phone into St. Louis, and call his mother in Kansas City, and the IXC would be charged the cheaper interstate rate, even though the caller was in Missouri when he made the call.

In any case, Global Crossing filed the present suit, claiming that Bell violated and continues to violate the Federal Communications Act of 1934, 47 U.S.C. sec. 151, *et seq.*, and

Bell's federal tariff, by using the cellular caller's area code as the point of origin for determining the rate, and thereby charging Global Crossing intrastate rates for what are truly interstate calls. Bell urges that while the matter could be heard in federal court, the Court should nonetheless dismiss or stay the case based upon the common-law doctrine of primary jurisdiction, and allow the Federal Communications Commission to hear the issue first. The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. *United States v. Western Pac. R.R Co.*, 325 U.S. 59, 63 (1956). In essence, the doctrine represents a determination that administrative agencies are better equipped than courts to handle particular questions, and that referral of appropriate questions to an agency ensures desirable uniformity of results. *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491 (10th Cir. 1996). The purposes of the doctrine are to: (1) ensure desirable uniformity in determinations of certain administrative questions; and (2) promote resort to agency experience and expertise where the court is presented with a question outside its conventional experience. *Western Pac. R.R.*, 325 U.S. at 64.

The Court agrees with Bell that the need to draw on the expertise of the Federal Communications Commission is paramount here, as is the need to promote uniformity and consistency within the telecommunications field. *See Access Telecomm. v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 608 (8th Cir. 1998). Global Crossing argues that because the Court need only interpret Bell's tariff, the Court should decide the issue. The Eighth Circuit rejected a similar argument in *Access*, recognizing that an argument that Bell violated its tariff in that case implicated broader concerns about whether a classification within the tariff was reasonable and required delving into technical aspects of telecommunications service. Thus, the

Eighth Circuit held that it was not an abuse of discretion for the district court to dismiss the action under the doctrine of primary jurisdiction.

This Court finds the same concerns are present here. The remaining issue, therefore, is whether to dismiss the action without prejudice or stay the matter while the parties resolve the issue before the Federal Communications Commission. This Court has the discretion to either stay the matter or, if the parties would not be unfairly disadvantaged, to dismiss it without prejudice. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). The Court finds that it would be more appropriate in this instance to stay the case pending the outcome of a decision from the Federal Communications Commission.

Therefore,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Case [doc. # 14] is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion to Stay [doc. # 17] is **GRANTED**. This case is **STAYED** pending a determination from the Federal Communications Commission of the issues raised in Plaintiff's Complaint.

Dated this 14th day of June, 2004.

E. Richard Webber

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GLOBAL CROSSING TELECOMMUNICATIONS, INC., Plaintiff,	)	
v.	)	Cause No. 4:04CV00319-ERW
SOUTHWESTERN BELL TELEPHONE, L.P., Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS BASED UPON THE DOCTRINE OF PRIMARY JURISDICTION

COMES NOW Defendant Southwestern Bell Telephone, L.P. d/b/a "SBC Missouri" ("SBC Missouri") and respectfully submits its Memorandum of Law in Support of its Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction

Introduction

Resolution of this lawsuit will require: (1) a determination as to which of two telecommunications tariffs applies; (2) an interpretation of tariff language and special telecommunications terms of art; (3) an immersion into the technical details of how mobile telephone traffic is originated, routed, terminated, classified, billed, and jurisdictionalized; and (4) a pronouncement of national telecommunications policy. As such, it is appropriate to dismiss this case ***without prejudice*** so that these difficult questions can be referred in the first instance, under the doctrine of primary jurisdiction, to the Federal Communications Commission ("FCC")-- the federal agency charged by Congress with interpreting federal telecommunications tariffs and setting national telecommunications policy.

Primary jurisdiction is a common law doctrine that is utilized to coordinate judicial and administrative decision-making. ***Access Telecommunications, LLC v. Southwestern Bell Telephone Company***, 137 F.3d 605, 608 (8th Cir. 1998); ***Red Lake Band of Chippewa Indians v. Barlow***, 846 F.2d 474, 476 (8th Cir. 1988). The doctrine allows a district court to refer a matter to the appropriate administrative agency for a ruling in the first instance, even where the matter is properly cognizable by the district court. ***Access Telecommunications, supra***, 137 F.3d at 608; ***Iowa Beef Processors, Inc. v. Illinois Central Gulf R.R. Co.***, 685 F.2d 255, 259 (8th Cir. 1982). One reason to apply the doctrine is to obtain the benefit of an agency's expertise and experience. ***Access Telecommunications, supra,*** 137 F.3d at 608. This is especially true when words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is needed to determine their meaning or proper application. *Id.* at 609. Another reason to apply the doctrine is to promote uniformity and consistency within a field of regulation. *Id.* Both the Eighth Circuit and the district courts in Missouri have applied the primary jurisdiction doctrine to refer to the FCC cases just like this one involving telecommunications access tariffs. ***Access, supra***, 137 F.3d at 609 (8th Cir. 1998); ***Southwestern Bell Telephone Company v. Allnet Communications***, 789 F.Supp. 302 (E.D. Mo. 1992); ***Sprint Spectrum, L.P. v. AT&T Corporation***, 168 F.Suipp. 2d 1095 (W.D. Mo. 2001). The same treatment is required here. The case must be dismissed to allow the Plaintiff the opportunity to re-file at the FCC.

Facts

The crux of this dispute is how to characterize, for jurisdictional purposes, calls originated from cellular phones which are delivered by Global Crossing to Southwestern

Bell Telephone, L.P. for completion to the called number. Under the terms of federal and state tariffs, Global Crossing is required to pay for the use of Southwestern Bell Telephone's network to complete the calls. The charge varies depending on the classification of the call as interstate or intrastate. If the calls are determined to be interstate calls, then Global Crossing is billed pursuant to Southwestern Bell Telephone's federal access tariff filed with the FCC. If the calls are determined to be intrastate calls, Global Crossing is billed pursuant to the applicable Southwestern Bell Telephone access tariff on file with the public utility commissions in Missouri, Arkansas, Kansas, Oklahoma, and Texas. In Missouri and Texas especially, the rates for ***inter***state calls are lower than the rates for ***intra***state calls. Global Crossing seeks to re-characterize certain telephone traffic as interstate calls which were originally billed as intrastate calls. Instead of raising this issue with the FCC, Global Crossing attempts to get the Court to wade into this thicket of regulatory law and re-interpret these tariffs in its favor, and to reverse a tariff application which has been used since the adoption of the tariff in 1992.

A. Anatomy of a Telephone Call

When someone makes a telephone call from their home in New York to a customer of SBC Missouri in St. Louis, Missouri, the telephone signal is carried over the telephone wires of a local telephone carrier in New York (e.g. Verizon) and into that carrier's central office in New York. Thereafter, the local carrier in New York will hand off the interstate call to the long distance carrier (also called an "inter-exchange carrier" or "IXC"), like AT&T, Sprint, MCI, or SBC Long Distance, as selected by the calling customer. The IXC will carry the call across the country to Missouri. After transporting the call to Missouri, the IXC will hand off the call to SBC Missouri. SBC Missouri will route the call over its network to the called customer in St. Louis. Pursuant to tariffs filed with the FCC, SBC Missouri is entitled to compensation for carrying the call. This compensation for carrying the traffic to its final destination is called a "terminating access charge," and it is paid by the IXC to SBC Missouri. A similar type of network routing occurs when a customer in Kansas City, Missouri calls his mother in St. Louis. For that type of call, SBC Missouri also charges the IXC a "terminating access charge." In the first scenario, the call is interstate, so SBC Missouri charges an ***inter***state access charge, based on the terms of a ***federal*** tariff filed with the FCC. In the second scenario, SBC Missouri charges an ***intra***state access charge, based on the terms of a ***state*** tariff filed with the Missouri Public Service Commission ("MOPSC").1 Plaintiff is correct that the SBC Missouri access charge rates in Missouri for an ***intra***state call are higher than the rates for an ***inter***state call. Accordingly, if Plaintiff can re-categorize a call as ***inter***state versus ***intra***state, it saves money. That is what Global Crossing is attempting to do here.

B. <u>ANI and Call Detail</u>

When a telephone call is delivered by an IXC to SBC Missouri for termination, SBC Missouri's central office systems will receive the "call detail" from the IXC. "Call detail" can include such things as the number that is being called, the originating telephone number, the time of the call, the elapsed time of the call, and the access lines or trunk groups via which calls are routed. ***In the Matter of MCI Telecommunications Corp; Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service,*** FCC 85-145 (April 16, 1985), para. 5, fn. 10 (defining "call detail"). SBC Missouri uses a feature similar to "Caller ID" known as "Automated

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1 Global Crossing here apparently makes claims relating to alleged overcharges in all five of SBC Missouri's operating states—MO, KS, OK, AR, and TX. Each of these states has its own access tariffs for intrastate calls, and each has its own public utility commission.

Number Identification," or "ANI," to determine the origination point of the call. There are some times when the ANI is not passed by the IXC to SBC Missouri, making the number of the calling party unavailable. This could be caused by insufficient or mismatching technology, private branch exchanges ("PBXs"), private networks, re-sellers, FGA and FGB services, cable deficiencies, and a host of other reasons. In those cases, SBC Missouri looks to the IXC to provide assistance in documenting the location where the call originated. When call detail is available from the ANI, the traffic is referred to as "known" traffic; when call detail is unavailable, the traffic is referred to as "unknown" traffic. This dichotomy of "known" traffic (where ANI provides the originating telephone number) versus "unknown" traffic (where the originating telephone number is unavailable) is very important in determining how the IXC is billed.

C. The Trouble with Cellular

With cellular phones, tracking the origination point of a call is even more difficult. A customer can take his cellular phone, which may be assigned a 314 Missouri number, travel in his car across Missouri to California, all the while talking on his cellular phone. The ANI associated with a cellular number may be provided on such calls, but not the precise geographical location of the cellular customer making the call. SBC Missouri cannot determine from the ANI whether the caller, at the time he is talking, is in Missouri, Kansas, Colorado, Utah, Nevada, or California. Pursuant to the terms of its tariffs, SBC Missouri uses the call detail which shows the 314 account number in Missouri. So, in the example above, if the caller is actually driving in his car in Los Angeles at the time of the call, and calls his mother in Kansas City, SWBT bills the call as if it were a call from St. Louis to Kansas City (i.e. an ***intra***state call). Global

Crossing argues that this results in an overcharge. Of course, the exact opposite fact pattern can also occur. A customer with a 213-area-code Los Angeles cellular account can take his wireless phone to St. Louis, and while he is there, call his mother in Kansas City. SWBT will see the call as originating from Los Angeles, and will bill the call as if it originated in Los Angeles and terminated in Kansas City--a less expensive ***inter***state call. In that case, the caller was physically present in St. Louis when he called Kansas City. Under the reasoning which Global Crossing urges here, SBC Missouri could have billed the call as a more expensive intrastate call, but instead charged Global Crossing the lower amount. Global Crossing, without any proof, argues that the alleged "overcharges" outnumber the alleged "undercharges," thereby entitling it to relief.

D. The Cellular Phone Number is Used as the Origination Point

Proving exact origination points of cellular calls with the ANI is not currently possible. Recognizing that IXCs carrying cellular originating traffic (like Global Crossing) and cellular companies (like T-Mobile) were incapable of providing the origination point of every cellular call with the call detail information, SBC Missouri filed a tariff in 1992 with the FCC that was capable of administration. Where the cellular phone number of the calling party is provided to SBC Missouri in the call detail ("known" cellular traffic), SBC Missouri would use the location of the calling party's number as the origination point of the call, instead of the physical location of the calling party.

E. EES Method and PUI

Where the phone number of the calling party (whether it is a cellular call or not) is not identified in the calling detail (which can occur for various reasons), the IXC or cellular company would be required to determine from their own records or traffic studies what percentage of the traffic was interstate. In order to make such a determination, the FCC, in 1985, adopted a system known as the "Entry-Exit Surrogate," or "EES Method." *In the Matter of MCI Telecommunications*, *supra*, para. 9, 21, 25. Under this method, the IXC or cellular company tracks the exact point where the call entered its network. That point, wherever it may be, is deemed to be the origination point, or "entry point." *Id*, at para. 25. The termination point is the "station designated by dialing." *Id.* Using the origination and termination points of the traffic, the IXC or cellular company adds up all the minutes of interstate usage and all the minutes of total usage (intrastate plus interstate), to arrive at a percentage. This was called the "percentage of interstate use," or "PIU." For example, if Global Crossing determined through some kind of call sampling under the EES Method that 58% of their unknown traffic was interstate, and 42% was intrastate, they would supply a PIU of 58%. Then 58% of the volume of "unknown" traffic would be billed under the federal tariff at the lower federal rate, and 42% of the "unknown" traffic would be billed under the state tariff at the higher rate. Under some tariffs, local exchange companies like SBC Missouri are allowed to periodically audit the records of IXCs to ensure that the PIU submitted is accurate. ***The important thing to remember from this analysis, however, is that the EES Method, and the calculation of the PIU, only apply to "unknown traffic," and only apply where the calling party's number is not available in ANI and is not provided in the call detail. If the calling number is known, then this system is inapplicable.*** Global Crossing essentially admits this in its Complaint, at para. 13 (EES Method and calculation of PIU are only used when "the actual originating point—or geographic location—is unknown").

Despite the fact that the tariff has been applied in the same way for over twelve years, Global Crossing now urges a different interpretation. In order to understand the parties' differing interpretations, it is necessary to review the wording of the tariffs.

F. <u>The Tariffs</u>

1. <u>The Federal Tariff</u>

The federal tariff at issue here is contained in SBC Missouri's FCC Access Tariff No. 73, Section 2.4.1(A)(2)(b). The service purchased by Global Crossing to terminate these cellular originated calls is called Feature Group D ("FGD") Access Service. The tariff provides as follows:

> **Terminating**
>
> ["Known" Traffic]
> For… FGD…Access Services, ***where jurisdiction can be determined from the call detail***, the Telephone Company will bill ***according to such jurisdiction*** by developing a projected interstate percentage. The projected interstate percentage will be developed on a monthly basis, by end office, when the Switched Access service minutes (…FGD…) are measured by dividing the measured ***interstate terminating access minutes*** (the access minutes where ***the calling number*** is in one state and ***the called number*** is in another state) by the total terminating access minutes.
>
> ["Unknown" Traffic]
> For…FGD … Switched Access Services, ***where call details are insufficient to determine jurisdiction***, the customer [here, Global Crossing] will provide the interstate percentage of … FGD… ***terminating access minutes*** from each end office or LATA from which the customer may terminate traffic. If a LATA-level PIU factor is provided by the customer, the specified percentage will be applied to all end offices to which the customer may terminate traffic within the LATA or to those end offices for which an end office-level PIU is not provided. (bracketed titles added)

This tariff means that in order to determine the jurisdiction of a call (including a cellular call), the first question is whether the traffic is "known" or "unknown"—in other words, did SBC Missouri receive the ANI with the "call detail" ***showing the telephone number*** of the person calling? That is what the phrase "*...where jurisdiction can be determined from call detail...*" means. If the originating number is included in the call detail, then a determination is made based upon that telephone number. So, in the scenario where a person has a cellular phone with the number 314-210-4745 assigned to her, and she travels to Los Angeles and calls her mother in Kansas City, assuming the call detail includes the 314 number, SBC Missouri will treat the call as an intrastate call and bill it accordingly. Conversely, if a person has a Los Angeles cellular phone with a 213 area code and is traveling in St. Louis and calls her mother in Kansas City, if the originating number is included with the call detail, SBC Missouri will treat the call as an interstate call from California to Missouri.

This interpretation is supported by the reference to "calling numbers" in the next sentence of the tariff. The next sentence states that SBC Missouri will determine the appropriate number of inter- versus intra-state minutes by "...dividing the measured interstate terminating access minutes (the access minutes where ***the calling number*** is in one state and ***the called number*** is in another state) by the total terminating access minutes. Note that the tariff defines "*interstate terminating access minutes*" as the access minutes where the "calling ***number***" is in one state and "the called ***number***" is in another state. The tariff does NOT say the "calling party" or "the calling party's physical presence"—it says calling "number." The focus in the tariff is on the geographic location of the calling party's ***number***, not the geographical location of the calling party's ***body***.

2. The State Tariffs

With respect to the critical wording in the federal tariff which determines the jurisdictional nature of the call, the five state tariffs at issue here contain either identical or nearly identical wording to the federal tariff. The texts of each tariff are contained in the Appendix hereto.

Argument

A. The FCC has the Jurisdictional Authority to Decide this Matter

The Federal Communications Commission ("FCC") was created in 1934 by an Act of Congress. Congress determined that the FCC was charged with "...regulating interstate and foreign commerce in communication by wire and radio..." and to ensure "...wire and radio communication service with adequate facilities at reasonable charges...." ***47 U.S.C. Sec. 151***. Jurisdiction of the FCC was granted over "...all interstate and foreign communication by wire or radio...which originates and/or is received within the United States....." ***47 U.S.C. Sec. 152***. Pursuant to ***47 U.S.C. Sec. 201***, any charges for a telecommunications call, and every "practice, classification, or regulation" of SWBT must be "just and reasonable." Carriers like SBC Missouri are required to file their charges in tariffs with the FCC. ***47 U.S.C. Sec. 203***. It is the job of the FCC to determine whether the "...charges, practices, classifications, and regulations" are reasonable. ***47 U.S.C. Secs. 201(b); 204; 205; 208; Access Telecommunications, LLC v. Southwestern Bell telephone Company***, 137 F.3d 605, 609 (8th Cir. 1998). The FCC has the statutory authority to conduct investigations and hearings to settle the question as to whether a charge, practice, classification, or regulation is unreasonable, and if the FCC finds a violation, it can suspend or revoke all or part of the charge or classification, determine what the true charge or classification should be, and, in the appropriate case, assess fines, damages, or penalties. ***47 U.S.C. Secs. 204, 205, 208***. This case relates to whether cellular originating calls transferred by an IXC should be classified as interstate or intrastate, a matter clearly within the province of the FCC.

B. The Primary Jurisdiction Doctrine

The Supreme Court of the United States described the purpose and character of the primary jurisdiction doctrine in ***U.S. v. Western Pacific Railroad Company***, 352 U.S. 59 (1956), and distinguished the doctrine from the doctrine of exhaustion of administrative remedies:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. Exhaustion applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views. 352 U.S. at 63-64.

The Supreme Court of the United States has historically emphasized two principal factors when determining whether to apply the doctrine of primary jurisdiction: (1) the "...desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions;" and (2) "...the expert and specialized knowledge of the agencies involved." *Id.* at 64. The Court held that these two factors are "...part of the same principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Id.*

The United States Court of Appeals for the Eighth Circuit and the United States District Courts for the Eastern and Western Districts of Missouri have concluded, in cases very similar to the one at bar, that issues involving alleged over-billings for tariffed access charges are best resolved in the first instance by the FCC, and are appropriate matters for application of the primary jurisdiction doctrine.

In ***Access Telecommunications, LLC v. Southwestern Bell Telephone Company***, 137 F.3d 605, 607 (8th Cir. 1998), a re-seller of long distance service alleged that SBC Missouri over-charged the re-seller for tariffed "voice grade service." SBC Missouri allowed re-sellers to choose the quality of their connections from one of twelve voice grades. *Id.* Voice Grade 1 was the lowest level of quality; Voice Grade 12 was the highest and most expensive. *Id.* The re-seller chose Voice Grade 7 ("VG 7") service. *Id.* Under SBC Missouri's tariff, there were two tariffed rate schedules for VG 7 service—a four-wire circuit (more expensive) and a two-wire circuit (less expensive). *Id.* The re-seller chose the less expensive two-wire circuit. *Id.* The re-seller complained when SBC Missouri told the re-seller that it was required to get the more expensive four-wire VG7 service, because the reseller's business location was located more than 6,000 feet from a SBC Missouri central office. *Id.* at 608. SBC Missouri contended that after 6,000 feet, SBC Missouri was unable to comply with technical transmission standards which were incorporated into the tariff, such as attenuation, distortion, echo control, phase jitter, and other aspects of service quality. *Id.* Access argued that 6,000 feet was not specified anywhere in the tariff. *Id.* Access brought a class action in this Court, alleging that it should be allowed to get service under the less expensive two-wire option, and demanded damages for over-charges for itself and other carriers.

The Eastern District of Missouri granted SBC Missouri's Motion to Dismiss based upon the doctrine of primary jurisdiction, and the Eighth Circuit affirmed. *Id.* at 609. The Eighth Circuit stated that in order to resolve the issue, it would become necessary to become embroiled in the technical aspects of VG 7 service. *Id.* at 609. The FCC, the Court held, had far more expertise than a court in determining matters such as circuit designs, signal transmission, noise distortion, and echo return loss. *Id.* The Court also held that resolving the issues in the case would require an understanding of numerous technical telecommunications terms of art. "Where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or application, as is the case here, the issue should first go to the appropriate administrative agency." *Id.* See also ***Iowa Beef Processors v. Ill. Central Gulf R. Co.***, 685 F.2d 255, 259 (8th Cir. 1982)("Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure"); ***Red Lake Band of Chippewa Indians v. Barlow,*** 846 F.2d 474, 476 (8th Cir. 1988)("...the most common reason for a court to hold that the agency has primary jurisdiction is that the judges, who deem themselves the generalists, should not act on a question until the administrators, who may be relatively the specialists, have acted on it").

The Eastern District of Missouri reached a similar conclusion in ***Southwestern Bell Telephone Company v. Allnet Communications Services, Inc.***, 789 F.Supp. 302

(E.D. Mo. 1992). In that case, SBC Missouri brought a collection action against a long distance provider, alleging that Allnet had refused to pay SBC Missouri for tariffed access charges. Allnet moved to have the case stayed under the doctrine of primary jurisdiction, arguing that Allnet had already filed a claim with the FCC urging a determination by the FCC that the SBC Missouri access tariff was unjust, unreasonable, and illegal. Judge Limbaugh agreed with Allnet, and stayed the matter under the primary jurisdiction doctrine. The Court held that resolution of the collection matter would necessarily involve a determination as to whether the tariff was reasonable, and the FCC was better equipped to make that determination. Moreover, the Court was concerned about upsetting consistent and uniform telecommunications policy if it intervened. Judge Limbaugh explained:

> The FCC has been responsible for regulating the communications industry for years. Its expertise in regulating telecommunications carriers makes it very familiar with the practices and policies governing the provision of long distance telephone services. The FCC has the ultimate authority under the Communications Act to determine the reasonableness of rates, practices, etc. but also grant relief to those victimized by unreasonable rates, practices, etc.....If this Court were to rule in favor of plaintiff, the underlying presumption would be that the rates were reasonable. What happens if the FCC, which has the express statutory authority to determine the reasonableness of rates charged by the telecommunications carrier, determines that these same rates are unreasonable? The duplicity of these actions and the inconsistent rulings would only create more problems for the parties and necessitate further litigation. *Id.* at 305.

The Western District made a similar determination in ***Sprint Spectrum, L.P. v. AT&T Corporation***, 168 F.Supp. 2d 1095 (W.D. Mo. 2001). In *Sprint Spectrum*, Sprint, a wireless carrier, contended that AT&T was using its local wireless network to carry and terminate long distance and toll calls. Sprint argued that it should be treated like the local exchange wireline carriers (e.g. like SBC Missouri) and be entitled to access charges for